

COMPLIANCE BOARD OPINION NO. 96-14

December 19, 1996

Mary R. Craig, Esquire

The Open Meetings Compliance Board has considered your complaint regarding alleged violations of the Open Meetings Act by the Baltimore Area Convention and Visitors Association, Inc. ("BACVA") on May 27, 1996. For the reasons stated below, the Compliance Board concludes that the Act does not apply to meetings of BACVA's board of directors.

I

Introduction

The facts are undisputed. On May 27, 1996, a reporter for the Baltimore Sun was denied access to a meeting of BACVA's board of directors. Moreover, BACVA has made clear that reporters generally will not be permitted to attend board meetings. If the Open Meetings Act applies to BACVA's board, these actions violate the Act.

With certain exclusions and exceptions, the Open Meetings Act requires every "public body" to meet in open session. §10-505 of the State Government Article. The determinative question, then, is whether BACVA's board is a "public body" within the meaning of that term in the Act.

In general, a public body is an entity that consists of at least two members and "is created by" State or local law in one of the forms specified by the statute:

1. the Maryland Constitution;
2. a State statute;
3. a county charter;
4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision of the State.

§10-502(h)(1)(ii). As a result of the 1991 revision of the Act, however, the definition of "public body" includes the following additional provision: "Public body" includes any multimember board, commission, or committee

appointed by the Governor or the chief executive authority of a political subdivision of the State, if the entity includes in its membership at least two individuals not employed by the State or a political subdivision of the State.” §10-502(h)(2).

BACVA was not created by any of the formal means specified in §10-502(h)(1)(ii). Rather, as we shall discuss, BACVA was created just as any other private corporation, and its board of directors exists by virtue of its articles of incorporation. Those same articles as amended, however, give the Mayor of Baltimore City the power to appoint every member of the BACVA board. Hence, the issue is whether this appointment authority means that the BACVA board is a “public body” by virtue of §10-502(h)(2), as a “multimember board ... appointed by ... the chief executive authority of a political subdivision”

BACVA was created by the filing of articles of incorporation on February 11, 1982. At the time, BACVA was known as Baltimore Convention Bureau, Inc. The board of directors was, of course, created by the articles of incorporation. Although we were not provided with a copy of the original corporate bylaws, which stated the manner in which the directors were selected, there is no suggestion that the Mayor played any formal role.

The Mayor’s current authority derives from an amendment to the corporation’s charter on June 30, 1995. Under the amended charter, the affairs of the corporation are to be managed by a 12-member board of directors. “The Mayor of the City of Baltimore shall appoint the Directors.” The Mayor also designates the member who is to serve as the chairperson of the board. You contend that, as a result of this amendment, BACVA’s board is now included within the term “public body.”

In its timely response, submitted on BACVA’s behalf by its counsel, Mark S. Demilio, Esquire, J. Mitchell Kearney, Esquire, and Margaret M. McKee, Esquire, BACVA insists that, as a private corporation, it is not the kind of “multimember board, commission or committee” that the Act is intended to encompass. BACVA argues that, although “the Mayor may appoint individuals to the Board of Directors, he did not create BACVA nor the Board of Directors, nor does he have the authority to dissolve or otherwise make decisions which may affect the continued existence of BACVA. As such, the BACVA is not a ‘public body’ as defined by the Act.”

III

Analysis

As we read it, the phrase “multimember board, commission, or committee” refers to entities that are part of government. When the Legislature used the term “board,” it apparently intended to refer to the kind of governmental entity that is called a “board,” not the board of directors of a private corporation.

In part, our conclusion is based on the common usage of the statutory terminology. The primary meaning of the term “board,” according to the standard legal dictionary, is “[a]n official or representative body organized to perform a trust or to execute official or representative functions or having the management of a public office or department exercising administrative or governmental functions.” *Black's Law Dictionary* 173 (6th ed. 1990). Moreover, because the terms “commission” and “committee” refer to governmental entities, the term “board” probably refers to another in the same class of entities. See 2A Norman J. Singer, *Sutherland Statutory Construction* §47.16, at 183 (1992) (“[O]rdinarily the coupling of words denotes an intention that they should be understood in the same general sense.”). See also, e.g., *Utility Elec. Supply, Inc. v. ABB Power T & D Co., Inc.*, 36 F.3d 737, 740 (8th Cir. 1994); *Chayt v. Board of Zoning Appeals*, 177 Md. 426, 433, 9 A.2d 747 (1939).

In part, our conclusion is based on the legislative history of §10-502(h)(2). When the 1991 reform bill was introduced, it contained the following as the proposed addition to the definition of “public body”: “‘Public body’ includes the multimember governing body of any corporation directly supported entirely by public funds.” This language was deleted by amendment and the language that now appears in §10-502(h)(2) was inserted in its stead. Because the deleted language referred to a corporate board of directors as the “governing body of [a] corporation,” it is unlikely that the Legislature intended to include a private corporation’s board of directors within the scope of §10-502(h)(2) as enacted, a version that reflected quite different language. This change of language indicates to us a change in the legislative objective — instead of applying the Act to publicly funded private corporations, the General Assembly continued to limit the reach of the law to those entities that are themselves governmental or quasi-governmental “board[s], commission[s], or committee[s].” The purpose of the enacted amendment to §10-502(h)(2), we believe, was to ensure that the Act would apply to all boards, commissions, and committees that are part of government, even if the Governor or the local executive chose to create a particular board, commission, or committee by informal means, instead of an executive order.

In our opinion, BACVA has not assumed the status of a government board, despite the Mayor's ability to control the membership of the board. Although control is surely an important factor in determining the governmental status of an entity, it is not alone determinative. *See A. S. Abell Publishing Corp. v. Mezzanotte*, 297 Md. 26, 35, 464, A.2d 1068 (1983). The decision to grant the Mayor appointment power was not the Mayor's. Because BACVA had been in existence long before the change to mayoral appointments of its board members, the decision to make the change was that of BACVA's prior board. Given that those board members had a fiduciary duty to the corporation, presumably their decision to amend the corporate charter reflected a belief that the new method of appointment was in the corporation's best interest. Moreover, the board members appointed by the Mayor have a fiduciary duty to the corporation. They are bound to advance the purposes of the corporation, which are identified not in any law nor in any pronouncement by the Mayor, but in the private corporate documents.

Undoubtedly, the interests of the City parallel those of the many private businesses that are members of BACVA. Neither these parallel interests, however, nor the appointment authority granted to the Mayor transforms BACVA into a City "board" within the meaning of § 10-502(h)(2).

IV

Conclusion

Accordingly, the Compliance Board is of the opinion that the board of directors of BACVA is not a "public body." Therefore, the Open Meetings Act does not apply to meetings of the BACVA board.

This conclusion reflects our interpretation of the law, not our view of wise policy. To the contrary: Because BACVA, despite its retaining the form and function of a private corporation, is in reality an instrumentality of City policy in an area of great public interest and importance, the Compliance Board strongly recommends that BACVA reconsider its policy. BACVA's board should welcome public observation of its decision-making process.

OPEN MEETINGS COMPLIANCE BOARD

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